No. 75

In the Supreme Court of the United States

OCTOBER TERM, 195

FEDERAL TRADE COMMISSION, PETITIONER

v.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled cause on February 21, 1952.

OPINION BELOW

The opinion of the court of appeals (R. 147) is reported at 194 F. 2d 633.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1952 (R. 152). The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the use of exclusive dealing contracts with theatre exhibitors by a producer of advertising motion picture films, found by the Federal Trade Commission to have "injurious effects" upon competition and a "tendency to monopoly," may constitute an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

2. Whether such exclusive dealing agreements were exempt from the Federal Trade Commission Act as "agency" contracts under the rule of *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U.S. 568.

3. Whether the order of the Federal Trade Commission requiring respondent to cease and desist from executing or continuing such exclusive dealing contracts, for periods of more than one year, represents an abuse of the Commission's discretion to formulate appropriate remedies for correcting unfair methods of competition.

STATUTE INVOLVED

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 717, 719, 15 U.S.C. 45, provides in part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The court below has set aside an order of the Federal Trade Commission prohibiting respondent from entering or maintaining certain types of exclusive dealing contracts. The proceeding before the Commission was instituted by a complaint filed by it in May, 1947, charging Motion Picture Advertising Service Company, Inc. ("MPA") with unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. MPA is engaged in the business of producing, selling and leasing motion picture advertising films. It executes contracts with advertisers, both national and local, under which it furnishes the films and arranges for their exhibition. MPA also contracts with theatre exhibitors to have them show the advertising films in return for payments by MPA. A "substantial number" of MPA's exhibition contracts provide that the exhibitor will show only MPA films (R. 109). This exclusive dealing feature of the contracts was the gravamen of the Commission's complaint.

Following extensive hearings before an examiner, the Commission on October 17, 1950, issued its

findings, conclusion and order.[1] On the basis of the evidence adduced at the hearings, the Commission found:

As of August 1, 1947, MPA had screening contracts covering 4096 theatres in 27 states and the District of Columbia. It had exclusive dealing agreements with 2493 of these theatres. MPA is one of the four largest companies in the business.[2] Together, these four companies had exclusive dealing contracts covering approximately 75% of all theatres which show advertising films.[3] (R. 110-111.)

MPA's screening contracts with exhibitors run for periods of from one to five years (R. 108).

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[1] The trial examiner filed a recommended decision in which he concluded that the exclusive dealing contracts for a period of more than one year were in violation of Section 5 of the Federal Trade Commission Act (R. 72-101). He recommended that the Commission prohibit MPA from entering into any such contracts (R. 102). Exceptions to the examiner's recommended decision, briefs, and oral argument before the Commission were waived (R. 103).

[2] The Commission has also filed complaints against the other three major companies. Identical cease and desist orders were ultimately issued in October 1950 against all four respondents. All filed petitions to review, but only MPA and one other company (United Film Advertising Service) prosecuted their actions. United's suit is pending in the Eighth Circuit, but, by stipulation of the parties entered prior to judgment in the instant case, the judgment herein will also be determinative of United's case. The cease and desist orders directed against the remaining two companies have now become final, *i.e.*, non-reviewable, by operation of law (15 U.S.C. 45(g)).

[3] There were approximately 20,306 theatres in the United States as of that date. About 12,676 exhibited advertising films. The "Big Four" had exclusive dealing contracts covering 9,426 theatres. (R. 110.)

About 25% of the agreements are for the longest period; the majority are for one or two years (*ibid.*). MPA's contracts with advertisers run from 13 weeks to one year, but one-year contracts have become the standard practice (*ibid.*). Because the advertising contract is generally negotiated after the screening contract has been obtained, the duration of the two contracts often is not coextensive (R. 109). In such cases the practice is for the theatre to complete the showing of the advertising films covered by MPA's contract with the advertiser even though its own screening contract with MPA has expired (*ibid.*).

In the case of local advertisers, MPA generally supplies a film playlet from its film library (R. 107). To this is added a brief trailer identifying the particular advertiser (*ibid.*). For national advertisers, however, specific films are produced advertising the particular product and the advertiser bears the cost of producing the film (*ibid.*). Only about 60% of the country's motion picture theatres accept film advertising, and those which do show only a limited number of advertisements, varying from three to six at each show, because of the adverse audience reaction to an excessive number (R. 111).

In many instances theatres prefer to enter into exclusive dealing agreements, and such agreements give the advertiser assurance of exclusive use of the screen during the term of the contract (R. 112-113).

MPA's use of exclusive screening agreements has prevented competitors from showing their films in the theatres covered by these agreements and has thereby limited the outlets for their films in a field which in itself is more or less limited (R. 111).[4] This has had the effect of forcing some competitors to go out of business (*ibid.*). The injurious effect upon competitors, and the tendency to monopoly inherent in MPA's use of exclusive agreements, have been materially and cumulatively increased by the use of like exclusive agreements by the other three principal companies in the business (R. 111-112).

The Commission concluded that MPA's use of exclusive screening agreements which run for a period of more than one year constitutes "an unreasonable restraint and restriction of competition," and that prohibition of such contracts is required in the public interest (R. 115). It concluded that the fact that such agreements may aid the respondent in building up its business is not controlling where, as in the circumstances here, such agreements have the effect of unduly hindering, lessening and injuring competition (R. 113). The Commission also concluded that since advertising

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[4] The small companies characteristically do not produce their own films or maintain film libraries. A typical small operator first seeks to obtain space from a theatre. If successful, he then solicits advertising, usually from local merchants. He obtains playlet films from a library, to which are added name trailers. The small companies ordinarily do not seek or obtain exclusive screening rights (Commission's App. 6-7, 98; MPA's App. 24).

contracts for a period of one year have become "standard practice in the trade," since the definite availability of future screen space facilitates the securing of advertising contracts, and since film advertising space in theatres is limited, exclusive screening agreements for periods not in excess of one year are not an undue restraint upon competition (R. 114).

The Commission accordingly ordered MPA to cease and desist from (1) entering into any contracts giving it the exclusive privilege of exhibiting advertising films for more than one year, or (2) continuing in effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends more than one year beyond the date of service of the order (R. 116-117).[5]

In an accompanying opinion the Commission stated that its "corrective action" is directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of MPA's competitors (R. 123). The Commission also pointed out that its action does not impinge on MPA's right to contract for screen space for extended periods on a non-exclusive basis "under circumstances which do not unduly hinder competition" (*ibid.*).

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[5] The Commission subsequently denied MPA's motion (R. 129-134) to modify the cease and desist order by eliminating the prohibition on continuation of exclusive dealing agreements whose unexpired term extended for more than one year (R. 140-144).

The court of appeals, in setting aside the Commission's order, held that the proof failed to establish that MPA's exclusive dealing agreements were "unfair" methods of competition or that their prohibition would be "in the public interest" (R. 151).[6] The court further held that the Federal Trade Commission Act did not enlarge or change "the definition of unfair methods of competition as laid down by the courts prior to its enactment" (*ibid.*). It stated (R. 151-152):

> Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

The court concluded that, with available time and space for screen advertising severely limited, and with the nature of the business such that prospective screen advertisers require an assured outlet "for a reasonable time," MPA's use of exclusive contracts for periods longer than one year "was not unfair or unreasonable, but was rendered de-

[6] The court subsequently indicated that it was of the opinion that increasing the amount of screen advertising is not in the public interest, but the court stated that it was not dismissing the proceeding upon this ground (R. 151).

sirable and necessary by good-business acumen and ordinarily prudent management" (R. 152).

The court also appears to have rested its decision upon the further ground that the contract between MPA and the theatre owner is a "contract of agency" covered by the decision of this Court in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U.S. 568 (R. 151).[7]

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

(1) In holding that the Commission had erred in determining that MPA's use of exclusive screening contracts extending beyond the period of one year constitutes an unfair method of competition.

(2) In substituting its own judgment for that of the Commission as to whether MPA's practices are "unfair" methods of competition.

(3) In holding that a practice is not an unfair method of competition if it is "rendered desirable and necessary by good-business acumen and ordinarily prudent management."

(4) In holding that the contract between MPA and the theatre owner is a "contract of agency" governed by the holding in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U.S. 643.

(5) In holding that the common-law concept

[7] The court did not pass upon MPA's contention (R. 8) that a prior Commission proceeding was *res judicata* of the instant case. This contention was presented to, and rejected by, the Commission in a separate opinion issued early in the proceedings (R. 25-29).

of unfair competition fixes the scope of the prohibitions of "unfair methods of competition" in the Federal Trade Commission Act.

(6) In setting aside the Commission's cease and desist order and dismissing its complaint.

REASONS FOR GRANTING THE WRIT

1. The decision below appears to be primarily grounded upon an erroneous interpretation of the meaning and scope of the term "unfair methods of competition" in Section 5 of the Federal Trade Commission Act. This statute was enacted for the purpose of vesting the Commission with "adequate powers to hit at any trade practice * * * which restrained competition or might lead to such restraint if not stopped in its incipient stages." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693.

We submit that the present case manifestly comes within the ambit of the Commission's statutory powers as thus defined. The Commission found, and the record establishes, that MPA's exclusive dealing contracts have excluded its competitors from a substantial segment of the market for advertising films. These agreements remove from the market 2,493 theatres, or approximately 40% of the total number of theatres (6260) displaying advertising in MPA's market area. In terms of the entire market, MPA's exclusive contracts have closed to competitors approximately 20% of the 12,676 theatres which display advertis-

ing films. The exclusive dealing agreements of MPA and the three other industry leaders have closed to competitors some 75% of the total market. None of these findings was questioned by the court below.

In a variety of situations, this Court has sustained the power of the Commission to prohibit as unfair methods of competition practices which tend to eliminate competitors, monopolize trade, or restrict opportunity to deal in a free market.[8] Clearly in this case, prohibition of the exclusive dealing agreements, found to have "injurious effects" upon competition and a "tendency to monopoly," was well within the Commission's statutory power.

The interpretation which the court below placed on the Trade Commission Act, that it applies only to practices coming within the common law concept of unfair competition, is directly contrary to the holding of this Court in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304. It was there held (pp. 310-311), upon a careful review of legislative history, that Congress adopted the "broader and more flexible" phrase "unfair meth-

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[8] Among the practices of this kind which this Court has held to constitute "unfair methods of competition" have been: boycott of competitors (*Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457); multiple basing point pricing system (*Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683); retail price maintenance (*Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U.S. 441); price fixing (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U.S. 52).

ods of competition" in place of the words "unfair competition" because the meaning which the common law had given to the latter words was deemed "too narrow." The Court further said (p. 312) that Congress advisedly adopted a phrase which does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" See also *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 648. In *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353, the Court said that Congress intended Section 5 of the Trade Commission Act to be a "flexible concept with evolving content."

The Commission's power to proscribe these exclusive dealing contracts is further supported by reference to the Sherman and the Clayton Acts. Conduct violative of either of these statutes is within the scope of the prohibitions of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 690-692; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 466. And exclusive dealing agreements have been repeatedly held unlawful under the Sherman Act and the Clayton Act.[9]

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[9] Sherman Act: *International Salt Co.* v. *United States*, 332 U.S. 392, 396; *Vitagraph, Inc.* v. *Perelman*, 95 F. 2d 142 (C.A. 3), certiorari denied 305 U.S. 610; *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N.D. Ohio), appeal

Moreover, trade practices which are not actual violations of the Sherman and Clayton Acts, but which contravene the "public policy declared" in those Acts, constitute practices which Section 5 of the Federal Trade Commission Act authorizes the Commission to prohibit. *Fashion Originators' Guild* v. *Federal Trade Commission, supra,* at p. 463. Section 3 of the Clayton Act reflects a strong public policy against exclusive dealing arrangements. That section flatly prohibits such agreements by sellers of goods where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce. *Standard Oil Co. of California* v. *United States,* 337 U.S. 293; *Richfield Oil Corp.* v. *United States,* No. 395, this Term, decided April 21, 1952. Although the contracts in the instant case are presumably not within Section 3 since the exclusive commitment is by the *seller* of screen space (the theatre) rather than by the buyer (MPA), the effect on competition is the same in either situation. The basic public policy against exclusive dealing arrangements which adversely affect competition, as declared by Section 3 of the

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dismissed, 245 U.S. 675; *United States* v. *Eastman Kodak Co.,* 226 Fed. 62 (W.D. N.Y.), appeal dismissed, 255 U.S. 578; *United States* v. *Pullman Co.,* 50 F. Supp. 123 (E.D. Pa.), affirmed, 330 U.S. 806. Clayton Act: *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346; *Butterick Co.* v. *Federal Trade Commission,* 4 F. 2d 910 (C.A. 2), certiorari denied, 267 U.S. 602; *Standard Oil Company of Calif.* v. *United States,* 337 U.S. 293; *Richfield Oil Corp.* v. *United States,* Oct. T. 1951, No. 395; *Carter Carburetor Corp.* v. *Federal Trade Commission,* 112 F. 2d 722 (C.A. 8).

Clayton Act, brings MPA's exclusive contracts within the authority to prohibit unfair methods of competition conferred upon the Commission by Section 5 of the Federal Trade Commission Act.

We submit that the foregoing authorities clearly sustain the Commission's power to prohibit exclusive dealing contracts of the kind here involved. The decision below, that the Commission transcended its statutory authority in prohibiting such contracts, is in conflict with numerous decisions of this Court holding that the words "unfair methods of competition" embrace practices having the basic characteristics of the practice here involved.[10] The decision below also conflicts with the decision of the Court of Appeals for the Third Circuit in *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 121 F. 2d 968, which sustained a Commission order prohibiting exclusive dealing contracts as an unfair method of competition.[11] The contrary holding in the present case will, if it is allowed to stand, seriously impede the Commission's enforcement of the Act.

2. It is not clear what the court below meant by its statement (R. 151) that the "proof has failed to establish" that MPA's methods of competition are "unfair." If the court meant that what is "un-

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[10] See cases cited in note 8, *supra*, p. 11.

[11] The contracts that the Commission prohibited in that case were between Hershey, a manufacturer of chocolate bars, and the three largest operators of chocolate bar vending machines. Under the contracts Hershey agreed to sell chocolate bars exclusively to those operators.

fair" within the meaning of the statute is a question of fact requiring adequate evidentiary support, we submit that the court erred in its conclusion as to the issue presented in determining what is an "unfair" method of competition. This is the ultimate issue which the Commission is required to determine on the basis of all relevant facts shown by the evidence and found by the Commission. It is a question of law (*Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427), for determination by the Commission in the first instance, but subject to judicial review with respect to legal error in its determination.

If the court below meant that a practice which is claimed to be a business necessity cannot be an unfair method of competition notwithstanding its adverse effect upon competition or its tendency to monopoly, we submit that this interpretation of the statute is plainly incorrect. Virtually every unfair method of competition involving restriction of competition is sought to be defended on the ground of business necessity or convenience. The weight, if any, to be accorded such defense is a question peculiarly calling for the Commission's expertise; it is not one to be determined independently by a reviewing court by application of its own standards.

Furthermore the court's conclusion that exclusive contracts for more than a year's duration are necessary to the operation of this type of business

constitutes an erroneous invasion of the Commission's fact-finding functions. The court's apparent finding as to business necessity necessarily involved rejection of the Commission's conclusion that exclusive screening contracts running for more than one year are not "necessary to the performance of its [MPA's] contracts with advertisers" (R. 115). This conclusion has the support of the testimony of MPA's own district sales manager, that over 50% of its exclusive contracts are for only one year and that exclusive agreements for such period are "sufficient" under existing conditions (Comm. App. 99). The court's apparent finding also flies in the face of MPA's admission, made in its motion for modification of the Commission's order, that the prohibitions of the order, insofar as they apply to future exclusive screening contracts of more than a year's duration, can be complied with "without great financial loss or burden" (R. 133).

3. The court below held, as an apparently independent ground for its decision, that the exclusive dealing agreement involved in the instant case is a "contract of agency" governed by *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U.S. 568. In the *Curtis* case, this Court held that agreements by circulation agents to handle and supervise the distribution of Curtis publications exclusively were not, under the circumstances there existing, violative of Section 3 of the Clayton Act

or Section 5 of the Federal Trade Commission Act. In the instant case, however, the relationship between MPA and the exhibitor was not that of principal and agent, but that of buyer and seller of screen space. None of the usual indicia of agency is here present. The exhibitor does not in any respect act as a representative or agent of MPA. The latter had no power to control the exhibitor; it could not "enter the theatre and operate the [projection] machine or display the advertisements" (R. 151). The screening agreements do not make the exhibitor the agent of MPA any more than an independent retailer is the agent of the manufacturers whose products he handles.

We submit that treating MPA's exclusive dealing arrangements as agency contracts, and thus exempt from the Federal Trade Commission Act, is a perversion of the facts and a gross misapplication of the *Curtis* decision. It would create a wide loophole in the Act and seriously impede effective enforcement. Under such a holding, there would be virtually no buyer-seller relationship which could not be viewed as exempt from the Act on agency principles. During the present Term this Court rejected a similar attempt to insulate from Section 3 of the Clayton Act, on agency principles, exclusive dealing contracts between an oil company and its service station operators. *Richfield Oil Corp.* v. *United States*, *supra*.

4. Since the Commission could have proscribed

respondent's exclusive dealing agreements *in toto*, certainly it could select the lesser remedy of restricting their duration. The determination of "what remedy is necessary to eliminate the unfair * * * trade practices which have been disclosed" is within the "wide latitude" of the Commission's expert discretion. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612-613. Judicial review of the exercise of that discretion "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy" (*id.* 612). The courts will not interfere "except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*id.* 613). In the instant case the court below departed from that salutary rule when it substituted its own judgment for that of the Commission as to business needs or convenience which would, in the case of exclusive dealing agreements of more than a year's duration, remove them from the category of unfair methods of competition.

CONCLUSION

The decision below conflicts with decisions of this Court and with that of another circuit, and it presents an important question of federal law which this Court has not specifically decided. It is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1952.

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